United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2583

To be argued by
DOUGLAS F. EATON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2583

UNITED STATES OF AMERICA,

Appellee,

—v.—

SHELDON S. TURNER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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UNITED STATES OF AMERICA,

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—v.—

SHELDON S. TURNER,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Sheldon S. Turner appeals from a judgment of conviction entered on November 1, 1974 in the United States District Court for the Southern District of New York after a seven-day trial before the Honorable Robert L. Carter, United States District Judge, and a jury.

Indictment 74 Cr. 424, filed on April 17, 1974, charged Turner, Donald R. Richardson and Fred L. Herman in 19 counts with making false reports for the purpose of influencing Chemical Bank to make loans to York Litho Corp. of America, in violation of Title 18, United States Code, Section 1014 and Section 2.

The trial began on August 20, 1974. At the close of its case the Government consented to a judgment of acquittal on Counts 6, 10, 12 and 14 as to all defendants (Tr. 498).

On August 28, the jury acquitted Richardson and Herman, convicted Turner on each of the counts in which he personally signed a report (Counts 2, 3 and 11) and acquitted Turner on all of the remaining counts.

On November 1, 1974 Judge Carter sentenced Turner to consecutive terms of imprisonment of six months on each of Counts 2, 3 and 11 and imposed a fine of $6,000. Turner is serving this sentence at Federal Prison Camp, Eglin Air Force Base, Florida. Bail pending appeal was denied by Judge Carter and by this Court (Chief Judge Kaufman and Judges Anderson and Mulligan).

Statement of Facts

A. The Government's Case

In 1961, York Litho Corp. of America, a printing company located in Florida, entered into an accounts receivable financing agreement ("the agreement") with L. F. Dommerich & Co., Inc., a factoring company located in New York City. In 1968 L. F. Dommerich & Co. was acquired by Chemical Bank and was renamed Chemical Bank, Dommerich Division. Since then, it has been simply a division of the bank, just like the Installment Loan Division. In 1971 Turner acquired all of the stock of York Litho and became its president. The 1961 agreement (GX 101, App. 190-92) remained in effect, and Turner signed a personal guaranty (GX 103, App. 189) to induce Chemical Bank to continue the agreement.

In the agreement, York Litho promised to assign all of its current and future receivables to the bank. York Litho represented that the receivables would be bona fide obligations of its customers, that the obligations would be in existence at the time the receivables were assigned, and that there would be no defense or offset against any of them.

(GX 101, para. 1; App. 190). The bank agreed to advance to York Litho, at the bank's discretion, a sum up to 80% of the amount of the receivables which it found acceptable. (GX 101, para. 2; App. 190)

Each of the assignments was made on a form entitled Schedule of Assigned Receivables. The three defendants took turns signing these Schedules. They were mailed to the bank every few days, usually with copies of invoices and delivery receipts, since the Agreement required "conclusive evidence of shipment." (GX 101, para. 3; App. 190) The indictment charged that 19 of these Schedules listed one or more receivables that were not bona fide existing obligations of the customer named, and that some of the invoices and delivery receipts had been fabricated and forged. Turner signed three of these Schedules (GX 2, GX 3, GX 11), which listed receivables purportedly owed by three companies—The Adding Machine, Leigh Robins, Inc. and Little & Co.

One of the Government's main witnesses was William Driggers, a private investigator. On November 1, 1971 Turner hired Driggers to investigate a theft of a camera. He soon took Driggers into his confidence and consulted Driggers on various matters. Later in November, Turner told Driggers that he was defrauding the Chemical Bank, and had already defrauded it of approximately half a million dollars. (Tr. 446-47) Driggers promptly reported this to the FBI, and continued to meet with Turner. (Tr. 459)

Turner and Driggers discussed whether the federal authorities might move against Turner with search warrants. Turner said that he was preparing for such a possibility by building a "nest egg" or "escape fund," and at one point he said it had reached the figure of $30,000. (Tr. 450)

In late December 1971 or early January 1972, Turner told Driggers that two men from the bank were coming

down to make some inquiries about the accounts receivable. Turner said that some of the accounts receivable that been posted were false, but that the evidence of this had been quite well concealed. Driggers mentioned that he had seen an invoice reflecting a purchase by The Adding Machine. Turner complimented him on his alertness and said that that would not be left lying around. (Tr. 452-54) Later in January, the bank sent an accountant, Kenneth Kavanaugh, to work at the York Litho premises. On one occasion, Turner fooled Kavanaugh by giving him a stack of delivery receipts which had just been forged by Turner and Driggers. (Tr. 455-58)

In January or February 1972, Driggers introduced the FBI to April Kolinowski Martin, known as April Kelly, who was the other principal Government witness. (Tr. 458) She had a background in advertising, copywriting and business management (Tr. 324, 326), and was employed by Turner's companies from September 1971 to April 1972. In September and October 1971 she worked for Leigh Robins, Inc., a graphics company owned by Turner which soon became dormant after Turner acquired York Litho. (Tr. 313-17) Miss Kelly then went to work at York Litho's premises. There she set up an "in house" advertising agency called The Adding Machine, which consisted of herself and an art director. (Tr. 317-18, 352) Soon, however, Turner told her that The Adding Machine was to be shelved, and that her new duties were to "trouble-shoot" the plant for inefficiencies. (Tr. 325-26) As a result she became familiar with the entire operation of the plant.

Miss Kelly testified that delivery receipts were routinely forged at York Litho, usually by Richardson and Herman. She herself forged several delivery receipts at the direction of Richardson and Turner. She continued to forge receipts after advising the FBI that she was doing so. (Tr. 344-51) Neither Driggers nor Miss Kelly could say who had forged any particular receipt, but three receipts were positively

identified as forgeries by three customers who testified on other counts. (GX 13-2, Tr. 204-06; GX 13-6-A, Tr. 282; GX 19-2, Tr. 194, 202)

Miss Kelly's testimony also proved that specific receivables in the names of Leigh Robins, Inc. (GX 3-1, GX 11-3) and The Adding Machine (GX 11-1) were fictitious. Aside from the fact that these two companies were owned by Turner, York Litho never printed * anything for them. The purported delivery receipts were signed with names that did not correspond to the names of any employees of Leigh Robins, Inc. or The Adding Machine. (GX 3-2-A, GX 11-2, GX 11-2-A, GX 11-4, GX 11-4-A; Tr. 352-57) Miss Kelly discovered that her apartment address was being used on a purported invoice to The Adding Machine. She advised Turner, who said not to worry about it. (Tr. 432-34)

In early 1972 Turner handed Miss Kelly certain invoices and delivery receipts relating to The Adding Machine and several other purported customers. Turner told her to keep them in her desk and out of sight of the bookkeeper. Miss Kelly made photocopies of some of these documents and supplied the photocopies to the FBI. (Tr. 357-60, 401-03, 431)

On April 26, 27 and 28, 1972, Seymour Maselow, an auditing manager of the bank, met with Turner. Turner admitted that a large number of specific receivables were "no good" because the merchandise had never been shipped, including $4,108.00 in the name of The Adding Machine and $6,250.00 in the name of Little & Co.** (Tr. 41-51, App. 9-16; GX 116, App. 147)

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* The jury was entitled to conclude that York Litho also never received any orders from these two companies, although Miss Kelly could not swear to that. (Tr. 383-87, App. 79-83)

** Two of the receivables in the name of Little & Co. (GX 2-1, App. 155; GX 2-3, App. 158), totalling $3,600.00, were listed on the Schedule involved in Count 2. With respect to those two

[Footnote continued on following page]

In May 1972 Chemical Bank took possession of York Litho's premises and attempted to collect on all of the outstanding accounts receivable. The bank lost approximately $350,000 (Tr. 247-48), including a write-off of $15,399.00 on the Leigh Robins "account." (GX 209, App. 188; Tr. 211, App. 40)

B. Turner's Case

Turner did not testify. Harvey Goldstein, an attorney who once represented Turner, gave some rather vague testimony concerning a meeting which he attended with Turner and two representatives of Chemical Bank on January 17, 1972, regarding the renogotiation of the factoring agreement. The bank representatives presented certain papers. On Goldstein's advice, Turner refused to sign them, and "some sort of compromise came about." (Tr. 532-36)

Monte Siegel, a carpet salesman, testified that Turner had a fine reputation for honesty and decency. (Tr. 536-38; App. 114-15)

Menas Barsorian, Jr., a former York Litho employee, testified that The Adding Machine designed some products for some North Carolina companies. (Tr. 563-65) However, he conceded that these companies ordered directly from York Litho and did not order through The Adding Machine. (Tr. 581-85)

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specific receivables, Turner's admission was corroborated by the testimony of Con R. Little, the owner of Little & Co. (Tr. 117-121), and Rose Stephenson and Edwin Heinrich, whose companies were, in turn, customers of Little & Co. (Tr. 148-188). All three companies had done business with York Litho, but they never ordered or received the labels specified on those two receivables.

ARGUMENT

POINT I

The Court's instruction on the meaning of "bona fide and existing obligation" was correct.

On each Schedule of Assigned Receivables, above the signature line, appeared the following words: "We hereby represent and warrant as to each of said assigned receivables * * * that it represents a *bona fide and existing* obligation of the customer * * *." (GX 2, App. 152, 154; GX 3, App. 162, 164; GX 11, App. 170; emphasis supplied) Judge Carter's charge to the jury explained the terms "bona fide obligation" and "existing obligation." (Tr. 847-49, App. 130-131) Turner now claims that plain error was committed during the judge's explanation of "existing obligation." *

On most of the counts in the indictment, and on all three counts upon which Turner was convicted, the proof showed that the specified receivables did not represent a "bona fide" obligation, because the customer simply never ordered the merchandise. Other evidence showed that York Litho engaged in wide-spread "pre-billing," that is, assigning a receivable after the merchandise was ordered but before it was shipped, at a time when it did not represent an "existing" obligation. (Tr. 343-48). The indictment did not bother to bring charges on the pre-billing, with one exception, Count Seven. (GX 7-3, Tr. 295-97) Thus Judge Carter's explanation of "existing obligation" in effect applied only to Count Seven, on which Turner was acquitted.

Nevertheless, Turner now makes an elaborate argument that some of the pre-billed receivables could have repre-

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* Turner's brief says it objects to the explanation of "bona fide obligation," but it obviously intends to object to the explanation of "existing obligation."

sented "existing" obligations because they allegedly involved "specialized goods." Turner made no such argument at the trial, either to Judge Carter * or to the jury. York Litho's contract with the bank did not mention "specialized goods"; instead it required "conclusive evidence of shipment." (GX 101, para. 3, App. 190).** The only such evidence was the delivery receipts which York Litho submitted to the bank.

Judge Carter's instruction gave proper emphasis to the delivery of the merchandise. It was solidly grounded on the contract and the course of conduct between York Litho and the bank. However, in view of Turner's acquittal on Count Seven, this instruction is immaterial to Turner's appeal.

POINT II

Turner was not deprived of due process of law when Miss Kelly supplied the FBI with photocopies of documents which Turner had handed to her.

As noted above in the Statement of Facts, Turner handed certain delivery receipts and other documents to Miss Kelly and told her to hide them in her desk and

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* Turner's requests to charge never mentioned the Uniform Commercial Code, "specialized goods," "work in progress," "trade usage or custom in the printing industry," "seasonal cancellation of orders," or "enforceable obligation." His request on "Definition of False Statement" read in part: " * * * you are to consider the fact that in the contract between the Bank and York Litho Corporation of America provided for [sic] charge backs and credit adjustments for customers of the corporation who were dissatisfied with the work products *after delivery.*" (emphasis supplied) Immediately after the instruction complained of Judge Carter said: "There has also been testimony that the corporation would also have to make credit adjustments and charge-backs for dissatisfied customers." (Tr. 849)

** Turner's counsel falsely told the jury that there was no such requirement. (Tr. 766-67)

keep them out of sight of York Litho's bookkeeper. She made photocopies of some of these documents and supplied them to the FBI. These photocopies were not introduced at the trial. The original documents were last seen by Miss Kelly in her desk when she was fired. (Tr. 354-60) Subsequently, Chemical Bank took possession of the plant and supplied the FBI with various original documents from York Litho's files. These original documents were introduced at the trial; it is possible that they included some that had been in Miss Kelly's desk, *e.g.*, GX 11-1-A, App. 172 and GX 11-2-A, App. 174. (Tr. 223-24; App. 139-40)

Turner claims that Miss Kelly's actions were an invasion of his privacy. This claim is absurd. Miss Kelly did not rummage through his desk. She did not obtain these documents by means of a search. They came into her possession because Turner deliberately handed them to her. The Constitution does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966). The fact that Miss Kelly surreptitiously photocopied the documents did not infringe Turner's rights, because she was only recording what Turner had disclosed to her and what she was entitled to disclose to others. *Lopez* v. *United States*, 373 U.S. 427, 439 (1963); *United States* v. *Knohl*, 379 F.2d 427, 442-43 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967). Turner also claims that Miss Kelly's actions constituted "crimes under State law." He cites no authority for this bizarre claim.

In any event, all that Turner makes of these claims is that there should be "an evidentiary hearing to determine if the federal agents were led to the bank officers from a source independent of the documents turned over to them by Miss Kelly." No hearing is necessary. The answer is clear from the record: the independent source was Driggers. It was Driggers who instigated the FBI's in-

vestigation of the bank fraud, and in fact it was Driggers who later introduced the FBI to Miss Kelly. (Tr. 458-59) See *United States* v. *Falley,* 489 F.2d 33, 40-41 (2d Cir. 1973).

POINT III

The Court correctly instructed the jury on the issue of knowing falsity.

Turner attacks the Court's instructions for failing to define the word "false." It is frivolous to suppose that any jury has to be told that the word "false" means "untrue." As to the broader issue of *knowing* falsity, Judge Carter's instruction (Tr. 853-54) was far more comprehensive than the instruction suggested in Turner's brief.

POINT IV

The Court was not required to instruct that Driggers and Miss Kelly were accomplice witnesses.

Driggers and Miss Kelly were not true accomplices, since they were reporting to the FBI while they were forging delivery receipts. Turner's counsel's summation acknowledged that they were reporting to the FBI, but argued that, despite their testimony, they did *not* forge any delivery receipts. (Tr. 776-77, 783) Turner did not request any instruction on "accomplice witnesses", and Judge Carter did not give one. Turner did not except to the charge on this ground, Fed. R. Crim. P. 30. Judge Carter did give a lengthy instruction on appraising the credibility of witnesses and mentioned the possibilities of bias and interest. (Tr. 838-39).

Turner now states that "two assumptions would make the two witnesses accomplices," and he claims that it was plain error to omit an "accomplice" instruction. However,

where no request is made and no exception is taken to the charge as given, the absence of an "accomplice" instruction is not plain error. *United States* v. *Abrams*, 427 F.2d 86, 90 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970).

POINT V

The prosecutor's cross-examination of Turner's character witness was proper; so was the prosecutor's summation.

As noted above, Monte Siegel testified as a character witness for Turner. Turner complains about two questions which the prosecutor asked on cross-examination of Siegel.

The first question was:

> "Mr. Siegel, in your discussions with people in the community, have you ever heard that on approximately ten occasions Mr. Turner carried a quarter of a million dollars in currency for Las Vegas casinos?" (Tr. 538, App. 115).

This question was asked in good faith. The basis for the question was partly contained in two FBI memoranda which Judge Carter had just read *in camera*. (See Tr. 490-92 and sealed Court's Exhibit A.) One of these memoranda said in part:

> "DRIGGERS stated that * * * TURNER readily stated that he had made approximately ten runs to Las Vegas, Nevada carrying a quarter of million dollars on each run. The reason he did this was because he had gotten in debt for gambling and was doing it as a favor to the person, whom he would not name, he was indebted [sic]."

These memoranda also indicated that other people knew, independently from Turner's admissions to Driggers, that

Turner had transported cash for gambling casinos. (See sealed Court's Exhibit A, page 2.)*

The second question about which Turner complains resulted in the following:

> Q. Mr. Siegel, in your discussion with people in the community, have you heard that Mr. Turner is now awaiting trial on criminal charges of conspiracy in connection with the financial collapse of Cedars of Lebanon Hospital?
>
> * * * * *
>
> A. The way you state the question, no.
>
> Q. Have you heard that Mr. Turner is awaiting trial on any criminal charges in Florida?
>
> A. There have been some articles in the newspaper, yes.
>
> * * * * *
>
> Q. Mr. Siegel, on the basis of what you have read and heard, what is your understanding of the criminal charges upon which Mr. Turner is awaiting trial in the State of Florida?
>
> A. I believe it has something to do in conjunction with the failure or bankruptcy of Cedars of Lebanon Hospital. Just what they are in detail, I really don't know. (Tr. 541-44; App. 118-21)

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* Moreover, during the cross-examination, the prosecutor also had in his possession another FBI memorandum which was made part of the record in response to Turner's post-verdict motions. (Exhibit 1 to affidavit of Assistant United States Attorney Douglas F. Eaton, sworn to October 30, 1974, filed in the District Court on November 1, 1974). This showed that in October 1968, after an arrest in Oklahoma, Turner told two FBI agents that in 1967 he had become indebted to casinos in the Bahamas and Las Vegas, and then had been asked by a casino employee to do "a few favors." Turner told the FBI that he felt this would have involved carrying "skim money." He denied to the FBI that he ever actually carried "skim money," but he did not explain how he was able to satisfy his debts.

Turner now disputes his own witness. He claims that the charges were not "in connection with the financial collapse" of the hospital, but he declines to tell this Court what the charges were. Ample good-faith basis for the prosecutor's question was contained in a *New York Times* article (Exhibit 2 to affidavit of Douglas F. Eaton, *supra*).*

In short, the prosecutor's questions and Judge Carter's rulings were entirely proper.** *United States* v. *Wolfson*, 405 F.2d 779, 785-86 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969).

Turner's complaints about the prosecutor's summation are frivolous. Since Turner's counsel had claimed there was no reasonable inference of personal gain (Tr. 753-54), the prosecutor was entitled to point to the evidence that

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* On March 30, 1974, the hospital's board of trustees dismissed the hospital's president, Sanford K. Bronstein, Turner's father-in-law, and accused him of financial irresponsibility. On April 15 the hospital went bankrupt. On May 23 the State of Florida charged Bronstein with forging checks totalling $525,000 drawn on the hospital, and charged Bronstein, Turner, Arthur W. Tifford, Dalton Abbott and Tony Gil, Jr. with conspiring to be accessories to the forgeries after the fact. On October 25 a jury found all of the defendants guilty.

** Turner's brief omits to mention that Judge Carter gave a cautionary instruction:

> "Now in respect of Mr. Turner's character witness, Mr. Segal [sic], the Government on cross-examination asked him several questions about what he had heard. These questions were permitted for the limited purpose of testing how much Mr. Segal had heard about Mr. Turner. You may consider the questions asked and the answers given solely for that purpose and for the purpose of deciding the weight you will give Mr. Segal's testimony. You may not consider the questions and answers as affirmative evidence in support of the Government's burden of proof in this case. This case does not involve any of those alleged matters about which Mr. Segal was questioned, nor has there been any proof before you that any of the alleged incidents to which the questions referred are true." (Tr. 840-41) See *United States* v. *Giddins*, 273 F.2d 843, 846 (2d Cir.), *cert. denied*, 362 U.S. 971 (1960).

Turner said he had defrauded the bank of approximately half a million dollars and had built up a personal "escape fund" of $30,000. (Tr. 795, App. 125)

Turner's counsel argued on summation that nobody, including Driggers and Miss Kelly, forged any documents, "because if it was submitted to the bank it would be here and it would be in evidence." (Tr. 777, see also 755, 763-64, 767, 783) This was contrary to the evidence. Miss Kelly testified that in most instances a forged delivery receipt was submitted to the bank as soon as an order was received (Tr. 343-48), and that about 30 or 40 receivables were assigned each week (Tr. 374). In short, hundreds of forged delivery receipts were submitted to the bank, of which about 20 or 25 were forged by her (Tr. 411) and about three or four by Driggers (Tr. 458, 497). Maselow testified that the bank regularly destroyed such documents after one year, and that only a few survived which had been photocopied and kept in a separate file. (Tr. 38-39) Accordingly, the evidence fully justified the prosecutor's reply:

> * * * Mr. Washor made a big point of the fact that she couldn't recognize which delivery slips she had forged, and he made this same point again on Mr. Driggers.
>
> First of all, the testimony is that they signed them forehand and backhand making up names as fast as they could. There is no evidence that they could tell their signature, that it was written in their own handwriting. Second of all, the bank officials testified that there was a, I believe it was Mr. Maselow who testified that the bank has such a massive amount of paper that they destroy a number of documents every year, and there's a simple explanation for where most of the forged delivery tickets have gone.

> We have salvaged what we have salvaged, and that's what the indictment is about. It doesn't disprove that there were hundreds of other forged delivery tickets floating around both at the bank and at York Litho. Even [if] they were available there is no evidence that the handwriting could be recognized as April Kelly's. (Tr. 803-04, App. 127)

Finally, the prosecutor's statement at Tr. 806, App. 129 was an accurate summary of Maselow's testimony (Tr. 51-53) and the agreement (GX 101, para. 3, third sentence; App. 190).

Turner's flamboyant criticisms must be taken with a grain of salt since he made no objection to the summation. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940); *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971); *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972).

POINT VI

The Court had jurisdiction over the subject matter of the offense charged.

Turner acknowledges that his jurisdictional argument is contrary to this Court's ruling in *United States* v. *Sabatino*, 485 F.2d 540 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974). He does not present any reason why the holding in *Sabatino* should be reexamined.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DOUGLAS F. EATON, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 23rd day of December, 1974, he served ~~a copy~~ 3 copies of the within Brief for the U.S.A. by placing the same in a properly postpaid franked envelope addressed:

Arthur W. Tifford, Esq.
Suite 1922
One Biscayne Tower
Miami, Florida 33131

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing in front of the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Douglas F. Eaton

Sworn to before me this
23rd day of December, 1974.

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975